BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER L. LIDDICK,

Claimant,

vs.

CAMPING WORLD,

Employer,

and

ACE AMERICAN INS. CO.,

Insurance Carrier,
Defendants.

File No. 5052583

ARBITRATION

DECISION

Head Note Nos.: 1802, 1803

STATEMENT OF THE CASE

Claimant, Roger Liddick, filed a petition in arbitration seeking workers' compensation benefits from Camping World, employer, and Ace American Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on September 25, 2014. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch. The record in this case consists of joint exhibits 1 through 20, claimant's exhibits 1 through 14, defendants' exhibits A through O and Q through U, and the testimony of the claimant and Kim Adland. The parties submitted post-hearing briefs, the matter being fully submitted on September 1, 2017.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained injuries beyond a stipulated injury to his cervical spine;

2. Whether claimant is entitled to temporary total disability/healing period benefits for the periods of September 26, 2014 through October 31, 2014; December 8, 2014 through August 20, 2015; and September 11, 2015 through August 28, 2016;

3. Whether claimant is entitled to temporary partial disability benefits for the period of August 21, 2015 through September 10, 2015;

4. Whether the injury of September 25, 2014 is a cause of permanent disability;

5. Extent of permanent disability, including extent of industrial disability and applicability of the odd-lot doctrine;

6. Commencement date for permanent disability benefits;

7. Whether defendants are responsible for claimed medical expenses;

8. Whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39;

9. Whether claimant is entitled to an award of alternate medical care under Iowa Code section 85.27;

10. Whether claimant is entitled to an award of penalty benefits under Iowa Code section 86.13 and, if so, how much; and

11. Specific taxation of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

During evidentiary hearing, claimant's testimony during direct examination was cooperative and clear. However, upon cross examination, claimant became evasive and on multiple occasions, attempted to answer questions posed by defendants' counsel with questions of his own. On multiple occasions, claimant's counsel and I directed claimant to answer cross examination questions, as opposed to asking counsel a question in response. In addition, during questioning regarding the reported death of his mother, claimant became visibly angry with defendants' counsel. He began to point emphatically at defendants' counsel with his allegedly injured right arm and refused to answer pending questions. I directed a recess be taken, at which time claimant left the room quickly and used his right arm to open the hearing room door without apparent difficulty. Upon claimant's return, he apologized to the undersigned for his behavior.

Claimant's behavior at evidentiary hearing is not unlike that of his prior depositions. Transcripts of claimant's February 29, 2016 and May 4, 2017 depositions were entered into evidence. During claimant's February 29, 2016 deposition, claimant was notably defensive and resistant to answering questions. (*See* CE11, pp. 4, 6, 8, 10) Claimant admitted he was angry at the handling of his claim. He generally appeared more cooperative at the second deposition on May 4, 2017.

Review of the remainder of the evidentiary record reveals additional concerns with respect to claimant's veracity. Most notably, the evidentiary record contains multiple accounts of claimant reporting the death of his own mother. On June 23, 2015, claimant reportedly telephoned his attorney's office and advised his mother had passed away, with visitation scheduled for June 30, 2015 at a local funeral home. At evidentiary hearing, claimant testified his mother was simply ill at this time and the family believed she would pass away.

After commencing employment at Max's Body Shop in August 2015, claimant reported his mother had been hospitalized, necessitating a missed work day. Two representatives of Max's Body Shop testified they believed claimant's mother passed away after this hospitalization, resulting in claimant missing work. At evidentiary hearing and during his May 2017 deposition, claimant testified his mother passed away while he was employed by Max's Body Shop.

In January 2017, claimant began work at Tom Cat Towing. A representative for Tom Cat Towing, Ms. Tallant, testified on one occasion, claimant telephoned in tears and reported he was following an ambulance containing his mother to the hospital. She testified the following day, claimant telephoned and stated life support would be discontinued. Claimant subsequently requested time off from work to attend a family gathering. Ms. Tallant testified she later telephoned claimant to advise of an upcoming meeting and spoke with a woman who identified herself as claimant's mother. Ms. Tallant testified in February 2017, she spoke with claimant's wife, who reportedly stated claimant's mother remained alive.

I find claimant's explanation with respect to these differing accounts of his mother's death unconvincing and lacking in substance. Additionally, claimant's credibility is drawn into question on multiple occasions throughout the evidentiary record. On claimant's job applications, he frequently failed to disclose his most recent employers and instead listed a family business for which he worked prior to 2000. The experience listed at that family business includes both body work and tow truck operation; the nature of the family business is unclear and was not disclosed in answers to interrogatories. Claimant's post-injury employers noted multiple disciplinary issues, including allegedly taking company-owned property, sideswiping a vehicle and refusing to stop, and engaging in a public altercation with his wife during which he physically pulled a window from her car. Finally and particularly concerning with respect to his alleged work-related injuries, claimant repeatedly denied a longstanding diagnosis of diabetes. Claimant's primary providers noted claimant's awareness of the diagnosis and lack of forthrightness regarding the condition.

Claimant's credibility has been called into question on a number of occasions, on wide-ranging topics. I do not find claimant adequately explained these inconsistencies. Furthermore, claimant's demeanor during cross examination at hearing was defensive and aggressive. After consideration of the above, I find claimant is not a credible witness.

Claimant was 44 years of age at the time of hearing. He resides in Council Bluffs, Iowa with his wife and their children. (Claimant's testimony) Claimant shares three minor children with his wife. Claimant has ten children total. (CE11, p. 4) Claimant dropped out of school in the 8th grade; he never earned his high school diploma or its equivalent. (Claimant's testimony; CE2, p. 1)

Prior to 2000, claimant worked for his step-father's company, TK Auto. (Claimant's testimony) The evidentiary record indicates claimant worked from 2000 to 2001 performing oil and lube service on tractor trailers. (Claimant's testimony; CE2, p. 1) Claimant did not work from 2001 until 2006. (Claimant's testimony)

From late 2006 to early 2007, claimant worked as a repairman/welder on railcars. This employment ended following an alleged work-related injury on February 21, 2007, when a rail fell onto his foot. (Claimant's testimony; CE2, p. 1) Claimant entered into a compromise settlement with his former employer, Millennium Rail, and its insurance carrier regarding the alleged February 21, 2007 work injury. The documents note claimant alleged he sustained chronic regional pain syndrome (CRPS) of his left foot, as well as depression, as a result of the work injury. The documents were approved August 28, 2008; claimant received $120,000.00 in new money and $161,529.00 in a Medicare Set Aside to cover ongoing medical needs. (DER, pp. 1-4) Claimant testified a spinal cord stimulator was placed as a result of this injury. Claimant applied for and was granted Social Security Disability benefits. He received such benefits for a number of years, but ultimately elected to return to work. (Claimant's testimony)

For approximately five months in 2011, claimant worked part-time as a bouncer. (CE2, p. 1)

For an additional five months from 2011 to 2012, claimant worked as a railcar welder/repairman through a temporary staffing agency. (Claimant's testimony; CE2, p. 1) Claimant suffered an alleged work injury while in the employ of Spartan Staffing on March 16, 2012. Claimant testified he felt a pop in his low back upon lifting a support beam. Claimant alleged injury to his low back, with leg complaints. (Claimant's testimony; DES, p. 5)

On September 25, 2012, claimant presented to the neurology clinic at Nebraska Medical Center and was evaluated by David Franco, M.D. Claimant complained of pain, numbness and hypersensitivity of his bilateral lower extremities; claimant reported a period of being wheelchair-bound. (JE1a, pp. 1-2) Dr. Franco noted claimant had previously been diagnosed with CRPS following an alleged work injury in 2007, had a spinal cord stimulator implanted in 2008, and subsequently suffered another alleged

work injury to his low back, following which the stimulator became ineffective. (JE1a, p. 1) Dr. Franco ordered a cerebrospinal fluid analysis that was unremarkable. He reviewed claimant's CT myelogram and opined it revealed some spondylitic changes in the cervical spine, but no significant abnormalities of the lumbar spine. Dr. Franco also reviewed claimant's EMG/NCV, which he opined revealed findings consistent with a demyelinating motor and sensory neuropathy of both lower extremities, potentially consistent with diabetic neuropathy. (JE1a, p. 2)

Following examination, Dr. Franco opined the etiology of claimant's complaints was somewhat unclear and he was unable to definitively determine a neurological basis. He opined claimant's neurological exam revealed subjective sensory abnormalities and inconsistent motor examination. He opined claimant's CT and cerebrospinal fluid analysis results did not support a conclusion of a demyelinating or inflammatory process, nor significant structural spine disease. Additionally, Dr. Franco opined claimant's EMG results may be consistent with a relationship to diabetes. He recommended a series of labs and an EMG/NCV to determine the potential causes of claimant's neuropathy and myelopathy. (JE1a, p. 4)

Claimant underwent EMGs of his left upper and lower extremities on October 9, 2012. The administering physician described the left upper extremity examination as normal. The left lower extremity examination was also described as normal, but demonstrated "neuropathic type" interference of the muscles. (JE1a, p. 5)

On October 22, 2012, claimant presented to Kenneth Follett, M.D., of the Nebraska Medical Center neurosurgery clinic, to consider explanting claimant's thoracic spinal cord stimulator in order to allow for further workup of his bilateral leg complaints. Claimant reported development of similar burning pain in his shoulders, elbows, and arms, as well as swelling of his right hand similar to prior bilateral foot swelling. (JE1a, pp. 5-6) Dr. Follett indicated he would proceed with explant of the spinal cord stimulator to allow claimant to undergo an MRI, as claimant had not been able to use his stimulator for a substantial period. (JE1a, p. 6) The procedure occurred in November 2012. (JE1a, p. 9)

On March 23, 2013, claimant returned to Dr. Franco. Claimant continued to complain of disabling pain, numbness, and weakness of his lower extremities. Claimant denied any change in symptoms following removal of the spinal cord stimulator. Dr. Franco indicated he was unable to discern any neurological explanation for claimant's symptoms and further opined the etiology of claimant's complaints remained somewhat unclear. Dr. Franco opined claimant's extensive workup had been unrevealing. He opined the neurological exam revealed primarily subjective sensory abnormalities and an inconsistent motor exam. He again opined claimant's CT and cerebrospinal fluid analysis did not support a demyelinating or inflammatory process and did not reveal significant structural disease. Additionally, Dr. Franco opined claimant's EMG/NCV results were normal. Dr. Franco ultimately opined claimant fell within the broad category of neuropathic pain syndrome. He recommended continued treatment with the

pain clinic, as well as potential consideration of evaluation by a physical medicine rehabilitation consultant. (JE1a, pp. 7-8)

For a few weeks in December 2013, claimant performed sanding and prep work for a body shop. He left the work as he found it too strenuous on his low back and legs. (Claimant's testimony; CE2, p. 1)

On January 6, 2014, claimant began work at defendant-employer as a full-time service technician. As a service technician, claimant worked on campers. Duties included mechanical and electrical work, installing hitches and water heaters, repairing brakes and roofing, and performing oil changes. His initial wage was $17.00 per hour; he received raises and earned $19.00 per hour at the time of his stipulated work injury on September 25, 2014. Claimant also received employer-provided benefits, including health insurance and a 401k plan. (Claimant's testimony; CE2, p. 1)

On April 25, 2014, claimant was evaluated in the neurosurgery clinic at Nebraska Medical Center by Leslie Hellbusch, M.D. Claimant expressed complaints of constant back pain, as well as constant burning and numbness of his bilateral legs. Claimant reported some improvement after removal of the spinal cord stimulator. (JE1a, p. 9)

On July 31, 2014, claimant presented to CHI Health – Pain Medicine Clinic at the referral of Dr. Frederick Youngblood for chronic low back pain and lumbosacral radiculopathy. Richard Bose, M.D. evaluated claimant and recommended a lumbar epidural steroid injection (ESI). Claimant expressed interest in re-implanting his spinal cord stimulator. (JE2a, pp. 1, 2, 5) Dr. Bose performed a series of ESIs at L5-S1, occurring on August 5, 2014, August 26, 2014, and September 12, 2014. (JE2b, pp. 1-2; JE2c, p. 1)

Claimant entered into a compromise settlement with Spartan Staffing and its insurance carrier regarding the alleged March 16, 2012 injury. As support for the settlement, the parties attached the permanent restrictions identified by Dr. Hellbusch and Erick Alverio, PT's May 20, 2014 functional capacity evaluation (FCE), placing claimant in the sedentary physical demand category. (DES, pp. 12, 14) The documents were approved by this agency on September 23, 2014; the settlement terms indicate claimant received $100,000.00. (DES, pp. 2-4)

While at work on September 25, 2014, claimant utilized a drill on a camper to install a trailer hitch. The drill bit caught on the material, causing claimant's right arm to twist and jerk. He testified to feeling immediate pain of the right shoulder, neck, and right wrist. Upon reporting the need for medical treatment, defendant-employer transported claimant for evaluation. (Claimant's testimony)

On September 25, 2014, defendants referred claimant to the Alegent Creighton Emergency Department, where he was examined by James Kalar, M.D. Dr. Kalar noted complaints of the right wrist and shoulder following an injury at work involving a drill. (JE3a, p. 1) Dr. Kalar performed a physical examination and ordered x-rays of the

right wrist and shoulder, which revealed no fractures. (JE3a, pp. 4-5) Dr. Kalar provided a sling, prescribed Norco, and directed claimant to follow up at occupational health the following week. He also referred claimant to Sara Rygol, PA-C. (JE3a, pp. 5-6) In the interim, Dr. Kalar imposed work restrictions limiting claimant to sedentary work, no repetitive right hand movements, and minimal reaching. (JE3b)

Pursuant to Dr. Kalar's order, on September 29, 2014, claimant presented to Alegent Occupational Health. A nurse, who appeared to have the last name Pearson, took a health history. Nurse Pearson indicated claimant expressed refusal to take prescriptions, including insulin. (JE4a) Claimant reported an inability to raise his right arm upward and very painful movement of the wrist. Claimant indicated he was unable to put on his own shirt. Claimant was advised he would be seen by LeAnne Vitito, APRN, but refused. Upon refusal, Nurse Pearson observed claimant put on his shirt unassisted and leave. (JE4b)

Ms. Vitito also authored a note regarding the encounter on September 29, 2014 and denoted claimant complained of significant pain of the right wrist and shoulder. Ms. Vitito noted claimant became agitated and stated he did not trust medical providers because they had "screwed up" his back in the past. Ms. Vitito noted claimant stated he would see his own doctor and call his lawyer. Claimant declined further examination; Ms. Vitito noted claimant put on his shirt "in a matter of seconds" without assistance despite his claims of inability to dress himself, and left the room. Ms. Vitito commented claimant seemed "very emotionally disturbed and angry." (JE4c, p. 1)

That same date, claimant presented to Alegent Creighton Clinic and was examined by Sara Rygol, PA-C. Following examination, Ms. Rygol advised claimant to remain in his sling and issued a referral for orthopedic evaluation. Ms. Rygol issued an off work excuse, which she made retroactive to September 25, 2014. (JE5a, p. 2; JE5b; JE5d)

Pursuant to Ms. Rygol's order, on October 3, 2014, claimant presented to Miller Orthopedic Specialists (Miller Ortho) for evaluation with Roy Abraham, M.D. Claimant complained of a lack of sensation from his right elbow down, inability to move his right arm, and right shoulder pain. Dr. Abraham opined claimant's x-rays were unremarkable. Dr. Abraham described examination of claimant's right shoulder and muscles as difficult. He commented claimant appeared to not move his right shoulder and complained of a lot of pain of the right upper arm. Claimant also complained of no sensation from the mid-forearm to the fingers, which Dr. Abraham described as not physiologically possible. Following examination, Dr. Abraham assessed paresthesias and neurological deficit of the right arm. As he was unable to see a convincing pattern to explain claimant's complaints, Dr. Abraham ordered EMG/NCV testing. He maintained claimant's off work status. (JE6a)

On October 8, 2014, claimant returned to Dr. Bose and reported a recent work injury to his right upper extremity. Claimant described a forceful rotation injury to his right rotator cuff and subsequent development of numbness, tingling, and neuropathic

burning pain throughout the right upper extremity. Dr. Bose noted the claimant was being handled as a workers' compensation claim. He and claimant discussed proceeding with re-implantation of a spinal cord stimulator. (JE2c, p. 1)

Claimant returned to Dr. Abraham on October 31, 2014. Dr. Abraham noted a history of "some bizarre paresthesia" of the right arm. He noted claimant failed to keep a scheduled EMG appointment. Claimant reported "everything [was] better" and expressed desire to return to work full duty. On examination, Dr. Abraham noted no apparent distress or major neurological deficits, and good range of motion of the right arm. He released claimant to full duty, to return as needed. (JE6b)

Claimant testified he requested a release, as his temporary disability benefits were insufficient to meet familial needs. Upon receiving a release, claimant returned to work at defendant-employer. (Claimant's testimony)

Claimant returned to Ms. Rygol on December 8, 2014 with complaints of right shoulder and upper neck pain since returning to work. Claimant also reported he had not been utilizing his diabetes medication and experienced dizziness at times. (JE5f, p. 1) Ms. Rygol ordered a right shoulder MRI and removed claimant from work pending the results. (JE5f, p. 2; JE5e)

On December 10, 2014, claimant returned to Dr. Abraham for evaluation. Dr. Abraham noted claimant's history of "bizarre paresthesia" in October. Claimant reported that following his requested full-duty work release, he developed a tearing sensation of his shoulder and hand numbness. Dr. Abraham opined claimant's examination remained unchanged. He ordered a right upper extremity EMG/NCV. In the interim, Dr. Abraham imposed work restrictions of no lifting, pushing, or pulling over 10 pounds with the right arm. (JE6c-e) Claimant testified defendant-employer was unable to accommodate his restrictions and he did not return to work. (Claimant's testimony)

Pursuant to Dr. Abraham's recommendation, on December 22, 2014, claimant presented to Bernadette Hughes, M.D. for EMG/NCV. Claimant denied a history of diabetes. Dr. Hughes opined the study was abnormal, with evidence suggestive of demyelinating greater than axonal, sensory greater than motor, polyneuropathy affecting the right arm. She commented the findings could represent a brachial plexopathy or could represent a more diffuse sensorimotor polyneuropathy affecting all claimant's extremities. (JE7a, pp. 1-2)

After undergoing EMG/NCV studies, claimant returned to Miller Ortho on December 23, 2014 and was examined by Caliste Hsu, M.D. Claimant reported that following the work injury, he had been unable to lift his right shoulder; had experienced significant pain and swelling of the right upper extremity; and felt some tingling and numbness in the long, ring, and small fingers, as well as the dorsal hand. On examination, Dr. Hsu noted decreased range of motion of the right shoulder, moderate swelling of the hand and wrist, and weakness of the right upper extremity. Dr. Hsu

reviewed claimant's EMG results and noted findings potentially suggestive of brachial plexopathy. She assessed right posttraumatic brachial plexus injury and right extensor tendinitis. Dr. Hsu ordered a right shoulder MRI to assess the right brachial plexus and prescribed gabapentin, meloxicam, and Norco. She also imposed work-restrictions of no use of the right hand. (JE6f, pp. 1-2)

Claimant returned to Miller Ortho on December 31, 2014 and was examined by Huy Trinh, M.D. Claimant reported persistent hand swelling and right upper extremity soreness. Dr. Trinh assessed: right brachial plexopathy versus right cervical radiculopathy; possible internal derangement of the right shoulder; and a suspected component of reflex sympathetic dystrophy (RSD) of the right upper extremity. He ordered a right shoulder MRI with arthrogram and cervical spine MRI. He prescribed Elavil and restricted claimant from use of the right upper extremity. (JE6h, pp. 1-2)

On January 13, 2015, claimant underwent a right shoulder MRI with arthrogram. The radiologist opined the results revealed a small anterior-inferior labral tear and mild supraspinatus tendinosis. (JE8a; JE8c) That same date, claimant underwent an MRI of his cervical spine. The radiologist opined it revealed diffuse spinal canal narrowing, most pronounced at C4-C5 through C6-C7; and multilevel foraminal narrowing, most pronounced at right C6-C7. (JE8b, pp. 1-2)

On January 16, 2015, claimant underwent a spinal cord stimulator lead placement by Dr. Bose. (JE2f-g) Claimant demonstrated excellent response to stimulation and on January 21, 2015, Dr. Bose referred claimant to John Hain, M.D. for permanent implantation. (JE2h, p. 1)

At the referral of Dr. Bose, claimant presented to Dr. Hain of Neurosurgical Associates of Nebraska on January 27, 2015. Claimant complained of severe pain, with a history of back and leg pain "for years." (JE9a, p. 1) Dr. Hain assessed chronic back and limb pain; he offered to replace claimant's spinal cord stimulator. (JE9a, p. 4)

On February 2, 2015, claimant returned to Dr. Trinh. Dr. Trinh reviewed claimant's cervical and right shoulder MRIs. He opined the right shoulder MRI demonstrated a small anterior/inferior labral tear, which Dr. Trinh opined was not significant enough to explain claimant's symptoms. He opined the cervical MRI revealed a broad-based central right disc protrusion at C6-C7, pressing against the C7 nerve root. Dr. Trinh assessed: right cervical radiculopathy, probably secondary to disc protrusion at C6-C7; and possible component of right brachial plexopathy. Dr. Trinh ordered a cervical ESI; in the event of failure, Dr. Trinh opined claimant might be a surgical candidate. He imposed restrictions of no lifting or carrying greater than 10 pounds, and no overhead work. (JE6j-k)

On February 25, 2015, claimant presented to Council Bluffs PCI and was evaluated by Jessica McCool, M.D. Dr. McCool noted claimant presented to establish care after he was unable to undergo an ESI due to blood sugar levels. She noted claimant suffered with uncontrolled type 2 diabetes, unmedicated for approximately six

months. Dr. McCool noted claimant had been diagnosed with diabetes approximately five years prior and smoked one pack of cigarettes per day. Claimant complained of cervical spine pain and lumbar spine issues with lower extremity neuropathy. (JE10a, p. 1) Dr. McCool assessed uncontrolled diabetes, ordered a course of laboratory testing, and referred claimant to meet with the clinic health coach. (JE10a, p. 3)

Immediately thereafter, claimant met with health coach, Andrea Flowers-Kyle, RN. Claimant informed Ms. Flowers-Kyle that he ceased taking his medication because he was tired of taking the prescriptions and did not believe they were helping. Ms. Flowers-Kyle informed claimant that with his high blood sugar, high cholesterol, and smoking, he would most certainly experience a cardiac event within five years. (JE10b, p. 1)

Following receipt of claimant's laboratory results, Dr. McCool telephoned claimant. She noted reservation as to whether claimant's pancreas was functioning. She issued prescriptions for diabetes medications. (JE10b, p. 2) Dr. McCool commented claimant did not appear "overly concerned" and seemed to believe his diabetes was a "joke." (JE10a, p. 3)

Claimant returned to Dr. Trinh on February 26, 2015. Dr. Trinh noted claimant was unable to receive the ordered ESI due to hyperglycemia. He again reviewed claimant's cervical MRI and opined that although the protrusion was present at C6-C7, it appeared to be below the foramen. On examination, Dr. Trinh noted significant grimacing and guarding on exam of the neck and shoulder. He described the neurological examination as unreliable. Dr. Trinh opined he no longer believed claimant suffered with right cervical radiculopathy and further opined the protrusion was not substantial enough to cause claimant's right shoulder and arm symptoms. He noted claimant "definitely" showed some excessive pain behavior. Dr. Trinh assessed nonspecific right neck, upper extremity, and shoulder pain; and nonspecific numbness of the right hand. He declined to recommend surgery and advised a referral with a neurosurgeon or spinal surgeon. In the interim, Dr. Trinh left claimant's work restrictions in place. (JE6l)

On March 17, 2015, claimant presented to the Mercy Emergency Department with complaints of swelling and pain of his right first finger. Claimant explained he punctured his finger the prior Saturday while reaching under a cabinet. (JE3c, p. 1) Kimberly Hagner, ARNP diagnosed an abscess at the base of the nail of the right first finger and initiated a course of oral antibiotics. (JE3c, pp. 5-6)

Claimant's employment at defendant-employer ceased effective March 31, 2015. Kim Adland, office manager for defendant-employer, testified claimant's termination was dictated by a corporate policy which states employees are terminated if off work for longer than 90 days. (Ms. Adland's testimony)

Claimant presented to Nebraska Spine and Pain Center (Nebraska Spine) on April 7, 2015 for a second opinion with board certified orthopedic surgeon, J.B. Gill,

M.D., with respect to his neck complaints. Claimant complained of neck pain and right arm pain, numbness, and tingling. Dr. Gill noted claimant had seen Dr. Trinh. Claimant admitted to a history of diabetes. (JE11a, p. 3; JE11b, p. 1) Dr. Gill reviewed claimant's cervical spine MRI and opined it revealed a right C6-C7 disc herniation impinging upon the right C7 nerve root. He also reviewed claimant's right shoulder MRI arthrogram, which he opined revealed a significant amount of fluid in the joint, as well as apparent tears of the labrum, biceps, and rotator cuff. (JE11b, p. 4)

Dr. Gill examined claimant. (JE1b, pp. 3-4) Following examination, Dr. Gill issued diagnoses of limb pain, cervicalgia, herniated disc at right C6-C7, and cervical spondylosis. Dr. Gill opined claimant presented with a right C6-C7 herniation causing right C7 radiculopathy, but expressed belief claimant's shoulder pathology was more pressing. Due to belief that the shoulder reflected the likely source of claimant's complaints, Dr. Gill referred claimant to Jonathan Buzzell, M.D. for evaluation and treatment of the shoulder. He advised claimant to return following receipt of care and continued claimant's existing work restrictions. (JE11b, pp. 4-5)

On April 10, 2015, claimant presented to Ortho West for right shoulder evaluation with Dr. Buzzell. Claimant admitted his history of diabetes and cigarette smoking. (JE12a, p. 2) Dr. Buzzell reviewed claimant's right shoulder MRI and opined it demonstrated a small anterior-inferior labral tear and mild supraspinatus tendinosis. (JE12b, p. 1; DEC, p. 1) He further opined claimant's rotator cuff, glenoid labrum, rotator cuff musculature, and biceps tendon were all intact. (JE12b, p. 3; DEC, p. 3) Dr. Buzzell performed a physical examination and noted very limited motion secondary to guarding and indicated he found it difficult to get any examination due to pain displays. (JE12b, pp. 2-3; DEC, pp. 2-3)

Following examination, Dr. Buzzell assessed right shoulder pain and cervical spondylosis. He performed a diagnostic injection of the subcoracoid/subdeltoid space and glenohumeral joint; claimant reported 25 percent improvement in symptoms, but Dr. Buzzell noted continued difficulty with testing. Dr. Buzzell opined claimant sustained minimal relief with injection, and it was unlikely claimant's mild shoulder pathology was significantly contributing to his symptoms. Dr. Buzzell opined claimant was not a surgical candidate from a shoulder standpoint. He expressed belief claimant's symptoms were more likely neurological and recommended return evaluation by Dr. Gill with respect to surgical options. Dr. Buzzell did order a course of physical therapy for claimant's shoulder and neck. Aside from this care, Dr. Buzzell opined claimant had achieved maximum medical improvement (MMI), without impairment, from a shoulder standpoint. (JE12b, p. 3; DEC, p. 3) He left claimant's existing restrictions in place. (JE12d)

Claimant continued to follow up periodically with Ms. Flowers-Kyle and Dr. McCool regarding his diabetes medications. (JE10b, p. 3; JE10d) On April 20, 2015, Dr. McCool noted claimant was a no-show for another appointment which could have resulted in admission to the hospital for possible diabetic ketoacidosis. Ms. Flowers-

Kyle telephoned claimant's wife, who indicated she was unaware of the missed appointments. (JE10e, p. 1)

Shortly thereafter, claimant was hospitalized for his diabetic condition at Jennie Edmundson Hospital and placed on an insulin drip. While claimant was not forthcoming that he had not been taking his medications as prescribed, claimant's wife informed hospital staff claimant had not been taking his medications properly. (JE13a, p. 1) Following improvement in his condition, Dr. McCool discharged claimant on April 24, 2015. (JE13a, p. 3) On discharge, claimant was diagnosed with poorly controlled type 2 diabetes with extreme hyperglycemia; resolved hyponatremia; tobacco use; and noncompliance. (JE13a, p. 1)

Claimant was directed to present to Dr. McCool's clinic immediately after discharge to obtain a medical device, but failed to present to Ms. Flowers-Kyle as recommended. (JE10e, p. 2; JE13a, p. 2) In claimant's record, Dr. McCool commented claimant had been discharged with prescriptions, but she highly doubted he would fill these prescriptions, as he failed to fill any past prescriptions. She expressed belief claimant would continue to be noncompliant in care and if so, noted he would be discharged from Dr. McCool's care. (JE10e, p. 2; JE13a, p. 3)

On April 28, 2015, claimant presented to Nebraska Medical Center for evaluation with neurosurgeon Dr. Hellbusch. (JE14c; CE3, pp. 1-2) Dr. Hellbusch noted claimant had scheduled an appointment regarding neck and right arm pain. (JE14a, p. 1) Dr. Hellbusch described physical examination as difficult and limited secondary to pain, with nonphysiologic give-way weakness. (JE14a, p. 2) Dr. Hellbusch reviewed claimant's EMG, cervical MRI, and right shoulder MRI reports. He assessed neck pain; right upper extremity pain and paresthesias; and cervical degenerative disc disease. Prior to issuing recommendations, Dr. Hellbusch requested to review claimant's MRIs personally. (JE14a, pp. 3-4)

Dr. Hellbusch subsequently received and reviewed the requested records. On April 30, 2015, Dr. Hellbusch opined claimant would be a candidate for a C6-C7 anterior cervical discectomy and fusion (ACDF). He opined the procedure had a reasonable chance of helping claimant's right upper extremity symptoms. However, he opined the surgery would not help with the probable peripheral neuropathy attributable to claimant's diabetes. (JE14b) When asked for further clarification, Dr. Hellbusch opined claimant presented with C6-C7 disc herniation which probably caused right upper extremity symptoms and the ACDF procedure would probably help relieve those symptoms. Dr. Hellbusch opined claimant also probably presented with peripheral neuropathy from diabetes; for these symptoms, Dr. Hellbusch opined claimant may benefit from prescription gabapentin or Cymbalta. (JE14c)

On June 26, 2015, claimant's counsel authored a letter to defendants' counsel, replying to a prior email. By his letter, counsel indicated claimant telephoned his office at 8:00 a.m. on June 23, 2015 and advised claimant's mother had passed away that morning. The following morning, claimant telephoned and stated he had missed a

scheduled appointment with Dr. Gill on June 23, 2015. The afternoon of June 24, 2015, claimant called his counsel's office and advised he had rescheduled his appointment with Dr. Gill for June 26, 2015. Counsel advised that visitation had been scheduled regarding claimant's mother for June 30, 2015 at Hoy Kilnoski Funeral Home. (DEU)

At evidentiary hearing, claimant testified his mother became ill and was hospitalized in June 2015. The family believed she would pass away and made funeral arrangements. (Claimant's testimony) At this point in cross examination, claimant became noticeably angry with defendants' counsel. He began to point at counsel with his right arm and stated the questions had no bearing on his injury at defendant-employer. I directed a recess be taken, at which point claimant left the hearing room. Upon exiting, claimant opened the hearing room door with his right arm. No limitation was observed in claimant's ability to use his right arm during this scene.

On June 26, 2015, claimant returned to Dr. Gill with reports of worsening neck and right arm pain. Dr. Gill noted Dr. Buzzell evaluated claimant and opined claimant lacked shoulder pathology. (JE11c, p. 1) Dr. Gill opined claimant's herniated disc at C6-C7 would correlate with his radicular complaints. Claimant expressed desire to proceed with surgical intervention. Dr. Gill informed claimant he would need to cease smoking prior to the procedure. (JEc, p. 4) In the interim, Dr. Gill imposed a sedentary work duty restriction. (JE11d)

On July 8, 2015, defendants' counsel authored a letter to Dr. Gill requesting further information regarding claimant's care. Dr. Gill authored response on September 16, 2015. Thereby, Dr. Gill issued diagnoses of right C6-C7 herniated disc; cervical spondylosis; cervicalgia; limb pain; and right C7 radiculopathy. He clarified he recommended an ACDF at C6-C7. Dr. Gill expressed belief the condition was work related. (JE11e, p. 1)

On September 16, 2015, claimant spoke with Ms. Flowers-Kyle regarding his diabetic medication. Claimant also reported increasing issues with his temper and anger, noting his anger was "becoming a problem." Ms. Flowers-Kyle advised claimant to follow up with Dr. McCool for evaluation. (JE10f, p. 2)

Claimant testified on several occasions, he received his weekly indemnity checks late. As a result, he sought employment to help with financial obligations. (Claimant's testimony)

Claimant obtained employment at Max's Body Shop performing body work. (CE2, p. 2) On his application, claimant indicated he graduated from high school and had never sustained an injury. (DEH, pp. 1-2) Also on his application, claimant identified his former employer as TK Auto, where he worked 12 years performing body work until his "mom closed shop" after his father's passing. (DEH, p. 2) He began work on August 21, 2015 and earned $14.00 per hour. (CE2, p. 2; DEH, p. 3) Shop foreman, Todd Fischer, testified claimant's duties as a body technician would have required lifting over 10 pounds, overhead activity, and overhead lifting. (DEI, p. 3)

Max's Body Shop records note claimant was out on August 27, 2015, as his mother was hospitalized. (DEH, p. 9) Claimant continued working at Max's Body Shop through September 10, 2015. (CE2, p. 2) He did not work from September 14, 2015 until November 9, 2015. (DEH, pp. 10-12)

At evidentiary hearing, claimant testified his mother passed away in August 2015, shortly following commencement of work at Max's Body Shop. In September 2015, claimant testified his physicians discovered a mass on his lung which was believed to be cancer. (Claimant's testimony)

At his second deposition on May 4, 2017, claimant testified his mom passed away from cancer during his employment at Max's Body Shop. Thereafter, he and his siblings were tested for cancer and claimant testified they found a "black mass" on his right lung. During this time, claimant testified he missed work due to his mother's death and due to his use of medications to treat what was subsequently diagnosed as histoplasmosis. (CE12, p. 2)

Mr. Fischer testified claimant came to his office in tears on one occasion and stated his mother was ill; Mr. Fischer testified he believed claimant's mother later passed away. As a result, Mr. Fischer testified claimant was off work for a time. Mr. Fischer testified claimant then informed him that claimant had been checked for cancer and the providers "found something on him." Mr. Fischer testified claimant then missed work due to his cancer treatment. Mr. Fischer testified he informed claimant that in order to return to work, claimant would need to provide a doctor's note releasing him to work. (DEI, p. 4)

Denise Bauer, office manager at Max's Body Shop, provided deposition testimony. (DEJ, p. 2) Ms. Bauer testified claimant missed work on August 27, 2015, as his mother was hospitalized. Ms. Bauer testified that shortly thereafter, claimant's mother passed away and he was off work for a period of time. She testified claimant was then tested and diagnosed with lung cancer; he missed work as a result. (DEJ, p. 5)

Max's Body Shop records contain a medical note authored by Rachel Stearnes, D.O., excusing claimant from work from October 21, 2015 to November 6, 2015. Dr. Stearns released claimant to return to work on November 9, 2015. (DEH, p. 7) Max's Body Shop records note claimant returned to work on November 9, 2015, worked 5.25 hours, and left due to illness. Claimant never returned to work at Max's Body Shop. (DEH, pp. 8, 12; DEI, p. 4; DEJ, p. 5)

On November 16, 2015, claimant underwent a medical examination in connection with a commercial drivers' license. On the form, claimant denied any injury or illness in the last five years. He also denied any diagnoses of diabetes, elevated blood sugar, spinal injury, or chronic low back pain. (DEQ, p. 1) Dr. Mark Young performed an examination and cleared claimant for a two-year certificate. However, he

also noted a small amount of glucose in claimant's urine, for which claimant indicated he would see a doctor. (DEQ, p. 2)

Claimant presented to Dr. McCool on November 25, 2015 for a preoperative appointment. She noted a history of largely uncontrolled type 2 diabetes, for which she had not seen claimant in months. (JE10g) She opined claimant was at a high risk with respect to wound healing secondary to poorly controlled diabetes, but left the decision as to whether to proceed up to claimant's surgeon. (JE10h)

On December 7, 2015, claimant underwent ACDF at C6-C7 with Dr. Gill. (JE11g, p. 1)

Claimant returned to Dr. Gill in postoperative follow up on December 22, 2015. Claimant complained of neck pain, interscapular pain, right upper extremity pain, numbness of the last three digits of the right hand, and weakness of the right upper extremity and hand. (JE11h, p. 1) On examination, Dr. Gill noted greater strength in the right arm than left arm. X-rays revealed stable fixation of implants. Dr. Gill indicated he was unable to explain claimant's ongoing right arm pain. He prescribed a Medrol Dosepak and left claimant's off-work restriction in place. (JE11h, p. 4)

On January 22, 2016, claimant returned to Dr. Gill and reported improved neck pain, but continued right parascapular and shoulder pain. Claimant estimated approximately 50 percent improvement in symptoms. (JE11l, p. 1) Dr. Gill ordered a course of physical therapy and imposed restrictions of a 15-pound lift; no excessive or repetitive bending; changing positions as needed; no overhead work or lifting; no pushing or pulling; and no reaching away from the body more than 12 inches. (JE11l, p. 4)

In February 2016, claimant participated in a short course of physical therapy at Excel Physical Therapy, as recommended by Dr. Gill. Claimant cancelled or no-showed multiple appointments. (JE15a-b)

Claimant returned to Dr. Gill on March 4, 2016 and reported further improvement in his neck pain, relaying only stiffness. Claimant reported unchanged shoulder pain and range of motion, as well as continued right arm pain and numbness. (JE11o, p. 1) Cervical x-rays revealed stable implants and solid fusion. Dr. Gill opined claimant had achieved MMI with respect to his neck condition and could return as needed. Due to continued shoulder symptoms, Dr. Gill recommended evaluation with shoulder specialist, Dr. Rosipal. (JE11o, p. 4)

On March 8, 2016, defendants agreed to continue claimant's indemnity benefits following achievement of MMI based on Dr. Gill's rating. (CE9t)

Shortly thereafter, on March 10, 2016, Dr. Gill authored a letter directed to defendants' counsel. Thereby, he restated claimant achieved MMI for his neck condition on March 4, 2016 and Dr. Gill did not anticipate a need for further treatment.

Dr. Gill opined claimant sustained a permanent impairment of 25 percent whole person as a result of the neck injury. Dr. Gill opined no permanent restrictions were necessary with respect to claimant's neck. (JE11q, pp. 1-2; DED, pp. 1-2)

On March 22, 2016, claimant's counsel authored correspondence to Dr. Gill. He noted claimant was scheduled to undergo an FCE on March 29, 2016 with Erick Alverio, PT, at Jennie Edmundson Physical Therapy to determine claimant's functional limitations. Counsel inquired if Dr. Gill consented to the FCE. On March 22, 2016, Dr. Gill stated he did not consent. (DED, p. 3)

Claimant's counsel informed Dr. Gill that Dr. Rosipal had performed a records review and declined to see claimant. On April 14, 2016, Dr. Gill identified additional providers who may be appropriate to evaluate claimant's shoulder. He identified Drs. Buzzell and Hutton at Ortho West, as well as Drs. Dubrow and Dilisio at CHI/Creighton. (JE11r)

Claimant retained rehabilitation consultant Alfred Marchisio, Jr., to author a vocational evaluation. Mr. Marchisio interviewed claimant on March 18, 2016 and performed a records review; he authored a vocational report dated April 5, 2016. Thereby, Mr. Marchisio opined Dr. Gill's January 22, 2016 restrictions eliminated claimant's access to all his past occupations. He opined claimant's chances of finding gainful employment were quite small and further opined claimant was likely an odd-lot worker. (CE4a, pp. 13-14)

On April 20, 2016, claimant returned to Dr. Buzzell for evaluation. Dr. Buzzell noted claimant complained of the same symptoms as at the time of his last evaluation. Dr. Buzzell again reviewed claimant's right shoulder MRI arthrogram, which he opined revealed a "sound" shoulder overall, with intact rotator cuff, glenoid labrum, and biceps. On examination, Dr. Buzzell noted right shoulder girdle pain and upper extremity pain with numbness and tingling. Dr. Buzzell also noted claimant demonstrated "very poor effort" on physical examination, as well as some symptom magnification. Additionally, Dr. Buzzell opined claimant's symptoms on examination were "not at all consistent" with typical presentations for rotator cuff or labrum pathology, arthritis, impingement, or instability. He opined claimant was non-surgical and had achieved MMI without permanent restrictions. (JE12f, p. 1; DEC, p. 4)

On May 16, 2016, claimant returned to Dr. Abraham at Miller Ortho. Claimant reported improvement in neck pain following cervical fusion. He continued to complain of right shoulder pain and right hand numbness. On examination, Dr. Abraham noted no effusion and very little wasting of the right shoulder. He noted claimant grimaced during examination and appeared to maximize his symptoms. Dr. Abraham opined claimant's right shoulder MRI revealed a small labral tear and some plexus. Dr. Abraham described nonspecific claims of right shoulder pain, with claimant reporting an inability to move his right shoulder. He opined claimant's complaints of hand numbness did not correspond to a real dermatome. Dr. Abraham ultimately assessed mild tendinitis of the right shoulder and performed an injection of Depo-Medrol. He opined claimant was not

a surgical candidate and had achieved MMI, without restrictions, from a shoulder standpoint. (JE6n; DEE)

Defendants' counsel authored correspondence to claimant's counsel dated May 31, 2016. Thereby, counsel noted claimant had been placed at MMI for his neck by Dr. Gill on March 4, 2016, without permanent restrictions, and at MMI for his shoulder by Dr. Buzzell on April 20, 2016 without permanent restrictions. Counsel also noted Dr. Abraham agreed claimant had achieved MMI on May 16, 2016 and opined claimant sustained no permanent impairment with respect to his shoulder. Based upon these opinions, counsel represented that defendants considered any indemnity benefits paid after April 20, 2016 to reflect permanent partial disability benefits. Due to a lack of permanent restrictions, counsel expressed belief claimant arguably sustained no industrial disability. As such, counsel provided notice that all indemnity benefits would be discontinued in 30 days. (DEB, p. 1)

At the referral of claimant's counsel, on July 21, 2016, claimant presented to CHI Health Orthopedics for evaluation with board-certified orthopedic surgeon, Matthew Dilisio, M.D. (JE16a, p. 1; JE16d) Claimant complained of severe pain from his neck reaching down to his hand, as well as weakness. (JE16a, p. 1) Dr. Dilisio reviewed claimant's shoulder MRI and opined it revealed no obvious full-thickness rotator cuff tear, well-maintained glenohumeral cartilage, mild acromioclavicular joint arthritis, no obvious labral tear, and minimal increased signal throughout. (JE16a, p. 7) On examination, Dr. Dilisio noted no gross muscular atrophy or masses, and intact skin and sensation. He opined claimant complained on nonspecific pain, weakness, and numbness of the shoulder and arm, which appeared non-dermatomal and non-myotomal. (JE16a, p. 6)

Dr. Dilisio opined claimant lacked any anatomical abnormality of the shoulder which caused diffuse neurologic symptoms down the arm. Rather, he opined claimant's history and examination were more consistent with traction-induced brachial plexopathy; a finding he opined was supported by EMG. Accordingly, Dr. Dilisio opined claimant's treatment should focus on brachial plexopathy, not the shoulder. He referred claimant to neurologist, Dr. Hughes, for evaluation. Dr. Dilisio additionally opined it would be reasonable to seek evaluation with a brachial plexus specialist; he provided contact information for Dr. Susan MacKinnon. (JE16a, p. 7) He offered nothing further with respect to the shoulder and imposed no permanent restrictions. (JE16c)

Claimant's counsel subsequently contacted Dr. Dilisio and inquired as to the most efficient course of care for claimant's right arm. Specifically, counsel inquired whether it would be more efficient to present to Dr. Hughes for evaluation or proceed directly to Dr. MacKinnon. Dr. Dilisio replied the most efficient method would be to present directly to Dr. MacKinnon. (CE5a, p. 1)

Defendants' counsel authored correspondence to Dr. Dilisio, noting his recommendations altered claimant's longstanding course of treatment. Counsel provided additional information regarding claimant's history and requested discussion of

any treatment recommendations. (DEG, pp. 1, 3) The evidentiary record contains no response from Dr. Dilisio.

On August 15, 2016, claimant telephoned Dr. McCool's office and requested an immediate appointment regarding his blood sugar levels on a DOT examination. Claimant informed the nurse he had not been diagnosed with diabetes and was not utilizing medication for blood sugars. She advised claimant no openings were available that day, but offered an appointment the following day. Claimant declined. (JE10i, p. 2) Dr. McCool subsequently reviewed the nurse's notes and authored comments. She expressed belief she had previously taken steps to "fire" claimant for noncompliance. Dr. McCool wrote claimant was aware of his diabetes diagnosis and expressed belief he was "trying to pull one over on the DOT provider." Ms. Flowers-Kyle then reviewed the documentation and indicated claimant had been sent a warning letter one year prior for noncompliance and had "chronically lied" about his diabetes. (JE10i, p. 3) Claimant was discharged from Dr. McCool's care due to noncompliance. (JE10j, p. 1)

On August 22, 2016, claimant applied for a tow truck driver position at Auto1 Towing. On his application, claimant noted a 13 year period of employment at TK Auto as a tow truck driver. He noted this position ended when his father passed away and his mother sold the shop. (DEK, p. 2) Claimant also indicated he completed high school. (DEK, p. 3) Claimant was hired and continued to work at Auto1 Towing through the November 27, 2016 pay period. (DEK, pp. 5-11)

For a few weeks in September 2016, claimant also worked as a tow truck driver for ARS Towing. He earned approximately $100.00 during this period. (CE2, p. 2)

On November 30, 2016, claimant received a written warning, identifying several disciplinary issues at Auto1 Towing. The warning noted claimant was not utilizing the time clock or performing pre/post trip reports. Additionally, the warning noted claimant was driving to a friend's house during his shift, where he would stay for 15 to 60 minutes. Finally, the warning noted claimant's personal vehicle had been at the lot on jacks, without wheels and tires, for a couple days. One day, claimant's vehicle had wheels and tires; claimant denied taking the parts from an impounded vehicle. Claimant was also recorded working on his personal vehicle for 2.5 hours during his shift on November 17, 2016. (DEK, p. 12)

Debra Goett, general manager for Auto1 Towing, provided deposition testimony. (DEL, p. 2) Ms. Goett testified claimant's duties included operating an autoloader and flatbed tow truck, both of which she described as physical jobs, as well as roadside assistance such as changing tires and light mechanic work. Ms. Goett testified claimant would have lifted as much as 40 pounds in performing his duties. (DEL, p. 6)

Ms. Goett testified claimant presented some disciplinary issues during his employment at Auto1 Towing. For example, she testified claimant did not properly use the time clock or complete pre/post trip reports. Ms. Goett testified Auto1 Towing trucks are equipped with GPS and claimant continued to present to a location she directed him

not to go due to safety concerns. (DEL, pp. 7-8) She testified individuals called in and reported claimant was sleeping in his vehicle, as opposed to patrolling locations. (DEL, p. 9) Finally, Ms. Goett testified claimant worked on his personal vehicle during work hours and appeared to have taken wheels and tires from an impounded vehicle. She explained claimant's personal vehicle had been on-site, without wheels and tires. Claimant's truck was later seen with the same wheels and tires that were missing from an impounded vehicle. She testified claimant denied taking the equipment, but returned the wheels and tires after he was accused of taking the items. (DEL, pp. 8, 13) Ms. Goett testified she intended to terminate claimant and posted his job to recruit a new employee. Claimant learned of the posting of his job and quit on November 27, 2016. (DEL, p. 9)

Claimant denied stealing tires or returning any tires after an accusation was levied. He denied the wheels and tires referenced by Ms. Goett were the correct size for his personal vehicle. Claimant testified Ms. Goett created reasons to discipline claimant after claimant refused her attempts to engage in text message conversations. (Claimant's testimony)

At the end of his employment at Auto1 Towing, a number of expenses were charged to claimant. Such expenses included: costs associated with tickets which were not submitted; charges for the expense incurred in returning vehicles illegally towed by claimant; and the cost of damage to dolly tires caused by claimant improperly loading a vehicle. (DEK, p. 13)

On November 21, 2016, claimant's attorney authored a letter to Dr. Gill inquiring if he consented to claimant undergoing an FCE at Excel Physical Therapy on December 1, 2016. On November 27, 2016, Dr. Gill replied and consented to the FCE, with the caveat the evaluation was designed to evaluate claimant's right shoulder, not cervical spine. (JE11t)

On December 1, 2016, claimant presented to Excel Physical Therapy for an FCE with Neal Wachholtz, PT. During the evaluation, claimant reported significant increase in right upper extremity pain with low levels of functional activity. Claimant also expressed concern about causing increase in his symptoms. Due to claimant's concern, Mr. Wachholtz terminated the FCE. (CE6b; DEF)

In December 2016, claimant applied for work as an on-call tow truck driver for All Pro Towing. On his application, claimant indicated he was a high school graduate. In terms of former employers, claimant identified Auto1 Towing and TK Auto. He indicated he worked for TK Auto for 13.5 years towing cars and trucks. (DEM, pp. 1-2) It appears claimant worked at All Pro Towing intermittently throughout December 2016. (DEM, pp. 3-5) Claimant testified he left All Pro Towing voluntarily, as his mother-in-law repeatedly called the office. (Claimant's testimony)

On January 24, 2017, claimant began work at Tom Cat Towing. (DEN, p. 4) On his application, claimant identified All Pro Towing, Auto1 Towing, and TK Auto as former

employers. Claimant indicated he worked at All Pro Towing from November 2016 to January 2017, but left due to family problems. He noted employment at Auto1 Towing from March 2016 to November 2016, which ended because he did not get along with his boss' girlfriend. (DEN, p. 1)

On February 17, 2017, claimant presented to the emergency room with reports of a right third finger crush injury. Claimant reported he caught his finger between the rim and brake caliper while working on a car at home. Staff noted a laceration, disruption of the nail bed, and pain complaints. (JE17a) Claimant was diagnosed with a distal middle finger fracture. (JE18a, pp. 1)

At evidentiary hearing, claimant testified he sustained this injury at B Street Collision, in connection with his work duties for Tom Cat Towing. Claimant testified he informed providers the injury happened at home at the direction of his boss. (Claimant's testimony)

Allison Tallant, office manager at Tom Cat Towing, provided deposition testimony. Ms. Tallant confirmed claimant began work as a tow truck driver on January 24, 2017. She testified his duties required lifting over 10 pounds and overhead work. (DEO, pp. 2, 5)

Ms. Tallant testified to a number of disciplinary issues with claimant during his employment at Tom Cat Towing. Ms. Tallant testified she received a call that claimant had sideswiped a vehicle in a Tom Cat Truck and left the scene. She testified claimant was unreachable on multiple occasions. Claimant also missed a number of shifts due to sickness. (DEO, p. 6)

Ms. Tallant testified claimant also claimed his mother was ill and passed away. Ms. Tallant testified she later found that to be false. (DEO, p. 6) On one occasion, Ms. Tallant testified claimant telephoned crying and stated he was following an ambulance to the hospital as his mother had stopped breathing. The following day, he telephoned and advised his mother was being removed from life support that day. Later that week, Ms. Tallant testified claimant telephoned and requested time off for a family gathering for his mother, but indicated no funeral would be held. (DEO, p. 7) Shortly thereafter, Ms. Tallant testified she telephoned claimant to advise of an upcoming company meeting. Ms. Tallant testified the woman who took the message represented she was claimant's mother. Claimant then presented to the meeting and spoke with coworkers about his mother's death. (DEO, p. 8)

On February 20, 2017, Ms. Tallant testified she received a telephone call from a bystander at Bucky's Gas. The bystander reportedly informed Ms. Tallant that claimant had driven into the station in a Tom Cat Towing truck, nearly struck a gas pump, and then walked to a vehicle and proceeded to pull a window from the car. (DEO, p. 6) Upon receipt of the call, Ms. Tallant went to Bucky's Gas. Claimant had left, but Ms. Tallant spoke with the driver of the damaged vehicle and learned it was claimant's wife. Ms. Tallant testified claimant's wife spoke about their marriage and claimant's behavior.

(DEO, p. 7) Claimant's wife reportedly informed Ms. Tallant she had met claimant in a public location to provide him some personal property, as the two had not been getting along. At this time, he became aggressive and ripped the car window from her vehicle. (DEO, p. 9) Ms. Tallant testified she brought up the passing of claimant's mother, at which point claimant's wife indicated his mother was "very much alive" and claimant had used her death as an "excuse" at two other employers. (DEO, p. 7) Tom Cat Towing terminated claimant that same date. (DEO, p. 9)

At evidentiary hearing, claimant denied striking a vehicle with a Tom Cat Towing truck. He also denied informing anyone at Tom Cat Towing that his mother had passed away. With respect to the altercation with his wife, claimant testified he pulled the window with his left arm and the window broke. (Claimant's testimony)

Claimant returned to the emergency room on February 28, 2017 with complaints of increased swelling and pain of the finger; he was admitted overnight for intravenous antibiotics. (JE17b; JE19b)

Claimant presented to personal physician, Mel Roca, M.D., on March 1, 2017. At that time, Dr. Roca opined claimant had recovered sufficiently from a bout of influenza and that he was cleared to participate in an FCE. However, he advised claimant to follow up in the emergency room regarding the finger fracture and laceration. (JE18a, pp. 1-2, 5) Claimant returned to the emergency room on March 1, 2017, as recommended by Dr. Roca. (JE19a-b)

On March 8, 2017, claimant presented to Nebraska Medical Center's orthopedic surgery – hand clinic, for evaluation by Joseph Morgan, M.D. Claimant reported sustaining a right long finger injury at work when his finger was crushed against a front wheel of a car. (JE1b) On March 10, 2017, claimant presented to the emergency room with complaints of right finger pain; he received Percocet. (JE1c)

On March 12, 2017, claimant was evaluated by Dr. Hsu and diagnosed with right middle finger cellulitis. (JE20a) The following day, March 13, 2017, Dr. Hsu performed surgery, consisting of a right middle finger amputation at the distal third middle phalanx. Dr. Hsu issued a postoperative diagnosis of right middle finger cellulitis and abscess with osteomyelitis. (JE20b, pp. 1-2) Dr. Hsu ultimately released claimant to full duty, without restrictions. (JE20c)

On March 16, 2017, claimant filed an original notice and petition in arbitration, seeking workers' compensation benefits from Tom Cat Towing and its insurance carrier as a result of an alleged February 17, 2017 injury. (DET, p. 1)

From April 11, 2017 to June 18, 2017, claimant worked as a tow truck driver for Ely's Towing. He earned an estimated $400.00 per week. (CE2, p. 2)

At the referral of claimant's counsel, on June 7, 2017, claimant presented to Jennie Edmundson Physical Therapy for FCE with Erick Alverio, PT. (CE8e, p. 1) Mr.

Alverio noted claimant completed an upper extremity FCE and gave maximum, consistent effort. (CE8e, p. 2) Mr. Alverio noted claimant was currently working as a tow truck driver, which fell within the medium exertional level, but claimant reported lifting primarily with his left arm. Mr. Alverio concluded claimant's FCE placed him in the sedentary exertional category and noted tasks requiring the ability to reach away from his body or overhead would exacerbate shoulder pain. (CE8e, p. 4) Specific FCE results demonstrated a maximum lift waist-to-floor or 18 pounds rarely, 12 pounds occasionally, and 6 pounds frequently, with no waist to crown lifting. (CE8e, p. 5)

Claimant's counsel provided Dr. Gill with copies of Mr. Alverio's June 7, 2017 FCE and Mr. Wachholtz's December 1, 2016 FCE for review on June 14, 2017. Claimant's counsel requested an opportunity to discuss the results of Mr. Alverio's FCE. (JE11v)

On June 23, 2017, claimant obtained employment as a tire repairman. His duties revolved around working on car, truck, and tractor tires. He works full time, 40 hours per week, and earns $15.45 per hour. The employment remained ongoing at the time of evidentiary hearing. (Claimant's testimony; CE2, p. 2)

Vocational consultant, Mr. Marchisio, authored a supplemental vocational report dated June 26, 2017. He noted Dr. Gill had placed claimant at MMI, without restrictions on March 4, 2016. (CE4b, p. 3) He further noted a December 1, 2016 FCE was stopped due to claimant's concern the evaluation would lead to increased symptoms. (CE4b, p. 4) Mr. Marchisio noted claimant's June 7, 2017 FCE focused on the right shoulder, and placed claimant in the sedentary physical demand category. (CE4b, pp. 4-5) He noted claimant was working as a tow truck driver, which qualified as a low level skilled occupation in the medium exertional category; he noted claimant testified he performed required lifting with his left hand. (CE4b, p. 7)

Mr. Marchisio ultimately opined claimant was unable to resume his prior occupations and further opined it was debatable whether claimant could tolerate working as a tow truck driver long-term. (CE4b, p. 9) Mr. Marchisio concluded if claimant was taken from medium exertional work to sedentary work with occasional reaching, claimant had lost access to the entire labor market. (CE4b, p. 10) In the event claimant was taken from medium to sedentary work, he would have suffered a loss of access to the labor market of 78 to 83 percent. Mr. Marchisio again expressed belief claimant qualified as an odd-lot worker. (CE4b, p. 11)

On June 27, 2017, claimant's counsel authored correspondence to Dr. Gill and inquired if Dr. Gill accepted the FCE completed by Mr. Alverio. (JE11w, p. 1) Dr. Gill authored a response on June 28, 2017. By his response, Dr. Gill noted Mr. Alverio's FCE did not include validity scores, a concern Dr. Gill indicated he previously raised in a meeting with counsel. Dr. Gill noted such scores are typically included in FCEs. Beyond this concern, Dr. Gill indicated he would accept the FCE findings as appropriate. (JE11x)

Defendants' counsel authored correspondence to Dr. Gill on June 29, 2017 in follow up of Dr. Gill's report accepting Mr. Alverio's FCE. (DED, p. 5) Dr. Gill authored a response to defendants' counsel on June 30, 2017. Thereby, Dr. Gill noted he reviewed Mr. Alverio's FCE and found some discrepancies and concerns that he identified to claimant's counsel. Specifically, Dr. Gill highlighted the lack of validity criteria in the FCE and the fact claimant had previously undergone an incomplete FCE with another examiner. Dr. Gill indicated he felt he had been "misled" by claimant's counsel regarding claimant's ongoing care. Dr. Gill indicated he stood by his opinion that no permanent restrictions were warranted with respect to claimant's cervical spine. He further retracted his prior letter with respect to Mr. Alverio's FCE and expressed desire his opinion simply be stated as claimant required no permanent restrictions from the neck condition. (DED, p. 4)

Mr. Alverio authored an addendum to his FCE report on June 30, 2017. Thereby, he described claimant's FCE as valid. (CE8f)

Claimant testified he desires additional evaluation and treatment of his right arm, in hopes his condition could be improved. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained injuries beyond a stipulated injury to his cervical spine.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In addition to sustaining an injury to his cervical spine as a result of the work injury on September 25, 2014, claimant also alleges he sustained injury to his right shoulder and to his right upper extremity. Claimant's right upper extremity condition is alleged as separate and distinct from any injury to the shoulder or neck which may have resulted in symptoms of the right upper extremity.

Claimant first alleges an injury to his right shoulder. Contemporaneous records reveal claimant immediately reported right shoulder symptoms following the work injury. Claimant underwent a right shoulder MRI which Drs. Trinh, Buzzell, and Abraham opined revealed a small labral tear; Dr. Buzzell also assessed some mild supraspinatus tendinosis.

Inconsistencies between claimant's presentation and objective findings are noted in records by multiple providers. Notably, shortly following the work injury, claimant reported an inability to use his right shoulder and an inability to dress himself; however, nurses observed him quickly dress himself when angry at the scope of examination. In April 2015, Dr. Buzzell described examination as difficult due to guarding and pain displays. He similarly noted very poor effort on examination and some symptom magnification on examination in April 2016. Dr. Abraham also opined claimant appeared to maximize his symptoms on examination in May 2016. Relatedly, at the time of evidentiary hearing, I personally observed claimant use his right arm freely, including pointing at defendants' counsel and opening a door quickly with his right arm.

Despite concerns regarding claimant's credibility in reports and presentation, multiple providers opined claimant demonstrated a small labral tear. Drs. Buzzell and Abraham also assessed mild tendinosis or tendinitis of the right shoulder. Claimant received treatment of his right shoulder, including physical therapy and multiple injections. I therefore find the work injury of September 25, 2014 also resulted in injury to claimant's right shoulder.

However, claimant's shoulder condition reached MMI without permanent impairment or need for restrictions. These opinions by Drs. Buzzell and Abraham are unrebutted by physicians. In fact, the opinions are supported by the opinion of claimant's chosen provider, Dr. Dilisio, who also opined claimant's right shoulder lacked any abnormality to cause ongoing complaints. He, too, recommended no restrictions for claimant's right shoulder and recommended no additional care. An FCE with Mr. Wachholtz designed to evaluate claimant's right shoulder was discontinued on December 1, 2016 due to claimant's expressed concerns regarding increased symptomatology.

Claimant relies upon an FCE authored by Mr. Alverio on June 7, 2017. I award no probative value to Mr. Alverio's FCE. In his FCE, Mr. Alverio considered claimant's entire right upper extremity, not simply the right shoulder; it is, therefore, not helpful in

determining whether any limitations are attributable to claimant's right shoulder. Mr. Alverio opined claimant's right upper extremity evaluation resulted in limitation to the sedentary exertional category of work. This opinion is entirely inconsistent with claimant's post-injury ability to obtain employment at multiple locations as a tow truck driver and later, a tire repairman. While claimant did not maintain such positions long-term, in each case, his employment ended due to issues personal to claimant. There is no evidence he was physically incapable of performing the requisite duties. Relatedly, Mr. Alverio placed claimant in the sedentary physical demand category even prior to his work injury on September 25, 2014, yet he was capable of maintaining physical work at defendant-employer. Mr. Alverio's FCE results do not appear to accurately reflect claimant's true physical abilities. Dr. Gill raised concern regarding the lack of validity criteria contained in Mr. Alverio's FCE and ultimately rescinded acceptance of the FCE due to his concerns.

Therefore, while claimant sustained injury to his right shoulder on September 25, 2014, I find the right shoulder injury resolved and is not the cause of any ongoing symptoms of claimant's right upper extremity.

Claimant also alleges he sustained injury to his right upper extremity which is independent from either the neck or right shoulder conditions. This injury is allegedly based in some form of nerve condition, neuropathy, or brachial plexus condition.

Shortly following the work injury, claimant informed Dr. Abraham he suffered with a lack of sensation from his mid-forearm down into his fingers. On October 3, 2014, Dr. Abraham opined such a complaint was not physiologically possible. Claimant then returned to Dr. Abraham on October 31, 2014, at which time Dr. Abraham noted claimant reported resolution of the bizarre paresthesia. Dr. Abraham examined claimant and noted no apparent distress or major neurological deficits, as well as good range of motion of the right arm. Dr. Abraham released claimant to return to work full duty.

Claimant did return to work at defendant-employer, but subsequently returned for further evaluation of complaints. He underwent an EMG/NCV with Dr. Hughes on December 22, 2014. Dr. Hughes opined the study was abnormal, with evidence of demyelinating, sensory polyneuropathy. She opined the findings could represent brachial plexopathy or a more diffuse sensorimotor polyneuropathy affecting claimant's extremities. Importantly, claimant denied a history of diabetes to Dr. Hughes. Dr. Hughes' lack of a complete and accurate history negates some value of the analysis of potential diagnoses.

Following the EMG/NCV, claimant saw a number of providers, with brachial plexopathy mentioned as a potential diagnosis by Drs. Hsu and Trinh. Dr. Hsu examined claimant on only one occasion. Dr. Trinh subsequently opined claimant neurological examination was unreliable and claimant demonstrated excessive pain behavior; he ultimately assessed only nonspecific upper extremity pain and hand numbness.

When claimant's right arm complaints continued following ACDF, claimant was evaluated by a number of physicians. He ultimately arrived at Dr. Dilisio, who on July 21, 2016, opined claimant's history and examination were more consistent with traction-induced brachial plexopathy than with any shoulder pathology. As such, a diagnosis fell outside Dr. Dilisio's field of expertise; he referred claimant to neurologist Dr. Hughes and opined it would be reasonable to seek evaluation with Dr. MacKinnon, a brachial plexus specialist.

Despite multiple mentions of brachial plexopathy as a potential cause of claimant's complaints, no physician has definitively opined claimant suffers with brachial plexopathy of the right arm. The possibility was raised as a differential diagnosis in 2014, but claimant did not disclose his diabetes diagnosis to Dr. Hughes and multiple providers noted unreliable, difficult exams, as well as excessive pain behavior and/or nonphysiologic findings. Dr. Dilisio re-raised the possible diagnosis in 2016, but the diagnosis has never been confirmed.

The lack of definitive diagnosis is particularly troublesome when coupled with claimant's history of diabetes. A diabetic condition is highly relevant to potential nerve/neuropathy conditions. As a result, knowledge of the condition is necessary for physicians to offer informed opinions. Claimant was not forthcoming with Dr. Hughes or the DOT medical examiner. The medical records also contain multiple instances where Dr. McCool or Ms. Flowers-Kyle note claimant's lack of truthfulness with respect to his condition.

Dr. Hellbusch, a physician chosen by claimant, evaluated claimant in April 2015. At that time, Dr. Hellbusch opined the ACDF procedure may relieve some right upper extremity symptoms. However, he opined the procedure would not provide any relief of a probable peripheral neuropathy which he attributed to claimant's diabetes. This probable diagnosis is notable, especially given Dr. Franco opined in 2012 that claimant's lower extremity EMG/NCV revealed findings potentially consistent with diabetic neuropathy.

Claimant carries the burden of proof of establishing a causal connection between the work injury and his right upper extremity complaints. In this instance, claimant lacks a specific diagnosis for his condition and accordingly, lacks an opinion specifically relating the diagnosis to the stipulated work injury of September 25, 2014. The lack of diagnosis, combined with concerns regarding the role of claimant's diabetes, leads me to conclude claimant has failed to meet his burden of proving he sustained a work-related injury to his right upper extremity.

The next issue for determination is whether claimant is entitled to temporary total disability/healing period benefits for the periods of September 26, 2014 through October 31, 2014; December 8, 2014 through August 20, 2015; and September 11, 2015 through August 28, 2016.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Claimant argues he is entitled to temporary total disability/healing period benefits from September 26, 2014 through October 31, 2014. During this period, claimant was off work by excuse of Ms. Rygol or under restrictions imposed by Dr. Abraham. Defendant-employer did not offer claimant work during this time, claimant was not capable of substantially similar employment, and had not achieved MMI. It is therefore determined claimant is entitled to temporary total disability/healing period benefits from September 26, 2014 through October 31, 2014.

Claimant next argues he is entitled to temporary total disability/healing period benefits from December 8, 2014 through August 20, 2015. During this period, claimant was removed from work by Ms. Rygol and subsequently, was under the restrictions of Drs. Abraham, Hsu, Trinh, and Gill. Claimant remained under Dr. Gill's sedentary work restriction when he was able to obtain employment at Max's Body Shop. Claimant began work at Max's Body Shop on August 21, 2015. It is therefore determined claimant is entitled to temporary total disability/healing period benefits from December 8, 2014 through August 20, 2015.

Finally, claimant argues he is entitled to temporary total disability/healing period benefits from September 11, 2015 through August 28, 2016. Claimant last regularly worked at Max's Body Shop on September 10, 2015. Thereafter, claimant was off work for conditions personal to himself. However, he also remained under Dr. Gill's sedentary work restriction; this restriction precluded claimant from substantially similar work and claimant had not achieved MMI. His entitlement to temporary total disability/healing period benefits restarted at this time. Claimant then worked for part of one day, November 9, 2015, at Max's Body Shop. Claimant concedes defendants are entitled to credit for the hours claimant was paid on this date.

Thereafter, claimant remained under work restrictions and without employment until he underwent ACDF surgery on December 7, 2015. After surgery, claimant was removed from work or under restrictions until released by Dr. Gill on March 4, 2016. At that time, Dr. Gill opined claimant had achieved MMI for his neck, without permanent restrictions.

While claimant was referred for additional shoulder evaluation, claimant was not again under work restrictions related to his work-related neck or right shoulder conditions. On April 20, 2016, Dr. Buzzell confirmed claimant had achieved MMI without restrictions relative to his right shoulder; however, Dr. Buzzell had previously placed claimant at MMI without restrictions or impairment on April 10, 2015. As a result, claimant's entitlement to temporary total disability/healing period benefits is not extended.

As of March 4, 2016, claimant had achieved MMI relative to both work-related conditions: the neck and right shoulder. As claimant had reached MMI, his entitlement to temporary total disability/healing period benefits ceases at that time. Therefore, it is determined claimant is entitled to temporary total disability/healing period benefits from September 11, 2015 through March 4, 2016.

The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $854.28, and claimant was married and entitled to five exemptions. The proper rate of compensation is therefore, $576.30.

The next issue for determination is whether claimant is entitled to temporary partial disability benefits for the period of August 21, 2015 through September 10, 2015.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

During the period of August 21, 2015 through September 10, 2015, claimant remained under Dr. Gill's restrictions limiting him to sedentary work. Claimant had not returned to work at defendant-employer, nor had he returned to work which was substantially similar to that which he performed at defendant-employer at the time of his injury. As claimant remained under work restrictions and was incapable of returning to substantially similar employment, claimant is entitled to temporary partial disability benefits from August 21, 2015 through September 10, 2015. Notably, defendants paid claimant healing period benefits during this period and are, therefore, entitled to a credit for the excess of benefits paid.

The next issue for determination is whether the injury of September 25, 2014 is a cause of permanent disability.

Claimant sustained a stipulated injury to his neck which resulted in a cervical fusion at C6-C7. The surgery improved claimant's condition, no further treatment is anticipated, and no permanent restrictions were imposed by his treating surgeon, Dr. Gill. As set forth *supra*, I reject the FCE results dictated by Mr. Alverio. Claimant testified to ongoing difficulties with respect to his neck, but claimant was not found to be a credible witness. However, claimant's surgeon, Dr. Gill, opined claimant sustained a 25 percent functional impairment as a result of the neck injury. On this basis, I find claimant has proven he sustained permanent disability as a result of his neck injury on September 25, 2014.

Claimant also sustained an injury to his right shoulder as a result of the September 25, 2014 work injury. However, as addressed *supra*, claimant's injury to his right shoulder resulted in no functional impairment, no permanent restrictions, and no credible reports of limited function or continued symptoms. As a result, I find claimant has failed to meet his burden of establishing the right shoulder injury resulted in permanent disability.

As determined *supra*, claimant failed to prove a work-related injury to his right upper extremity in the form of nerve-related/neuropathic complaints; this condition is not properly considered with respect to permanent disability issues.

The next issue for determination is the extent of permanent disability, including extent of industrial disability and applicability of the odd-lot doctrine.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties stipulated any permanent disability resultant from claimant's neck injury shall be evaluated industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v.

Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Claimant was 47 years of age on the date of evidentiary hearing. He completed the 7th grade, but lacks any additional formal education or training. His work history is unclear prior to 2000, but likely includes work for a family business. Thereafter, claimant's work history is sporadic and includes oil/lube technician, railcar repair and welding, bouncer, auto body work, and at defendant-employer. Prior to beginning at defendant-employer, claimant suffered two alleged work injuries which resulted in significant time out of the labor market. Claimant began at defendant-employer in January 2014; at the time of his injury, he earned $19.00 per hour.

Claimant suffered a stipulated work-related injury on September 25, 2014. The injury resulted in permanent disability to claimant's neck and necessitated ACDF surgery. Thereafter, Dr. Gill opined claimant suffered a 25 percent functional loss. No additional treatment has been contemplated. No permanent restrictions have been adopted and claimant has returned to employment at a number of employers,

performing physically demanding work. There is no credible evidence claimant's neck condition has resulted in any ongoing functional deficits to claimant, nor impacts his ongoing employability.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 25 percent industrial disability as a result of the stipulated work-related injury of September 25, 2014. Such an award entitles claimant to 125 weeks of permanent partial disability benefits (25 percent x 500 weeks = 125 weeks), payable at the weekly rate of $576.30.

Claimant has failed to produce sufficient evidence to make a prima facie case of total disability under the odd-lot doctrine. Claimant has only proven injury to his neck, resulting in permanent disability. This injury resulted in no physician-imposed restrictions. Claimant's vocational reports are based upon adoption of a rejected FCE report. Claimant returned to work at multiple employers as a tow truck driver and later as a tire repairman. Any impediment to claimant's maintaining employment at these subsequent employers is a result of concerns personal to claimant, as opposed to physical limitations related to his work-related neck injury. As claimant has failed to establish a prima facie case of total disability, claimant does not qualify as an odd-lot worker.

The next issue for determination is the commencement date for permanent disability benefits. By this decision, I determined claimant has proven permanent disability as a result of his cervical spine condition. At the time of hearing, the parties stipulated claimant achieved MMI for his neck condition on March 4, 2016 and this date reflects the proper commencement date for permanent disability benefits owed with respect to the neck condition. Pursuant to the stipulations of the parties, permanent partial disability benefits shall commence on March 4, 2016.

The next issue for determination is whether defendants are responsible for claimed medical expenses. At the time of hearing, defendants stipulated payment would be made for the claimed medical expenses. As a result, no independent determination of this issue is required.

The next issue for determination is whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the

reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Claimant seeks reimbursement for a $250.00 expense associated with an evaluation by Dr. Hellbusch on April 28, 2015. Prior to this evaluation, Dr. Buzzell, a physician retained by the employer, opined claimant achieved MMI without permanent impairment with respect to his right shoulder injury. This opinion triggered claimant's right to a reimbursable section 85.39 IME. Dr. Hellbusch's fee is inexpensive and entirely reasonable. Defendants shall reimburse claimant for Dr. Hellbusch's fee in the amount of $250.00.

The next issue for determination is whether claimant is entitled to an award of alternate medical care under Iowa Code section 85.27. Claimant sought an award of alternate medical care with Dr. MacKinnon regarding his ongoing right upper extremity nerve/neuropathy complaints. As claimant has failed to prove a causal connection between this condition and the work injury of September 25, 2014, he is not entitled to an award of alternate medical care.

The next issue for determination is whether claimant is entitled to an award of penalty benefits under Iowa Code section 86.13 and, if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount

unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

For purposes of determining whether an employer has delayed in making payments, payments are "made" either when (a) the check addressed to a claimant is

mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or when (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235. Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Claimant has alleged entitlement to penalty benefits with respect to both temporary disability benefits and permanent disability benefits. The best evidence tracking the information relevant to a potential delay in payment of benefits is contained in the supplied payment log. The payment log reflects the amount of benefits paid, the periods covered by the payments, and the issue date for the checks.

Overall, it appears the significant majority of disability benefit checks were paid timely and in some cases, before they became due. I fear the early payment of benefits may have led to some confusion with respect to the interval at which benefits were paid. However, irregular intervals do not automatically mean benefits were delayed when compared to the period to which the benefits corresponded.

Claimant was awarded healing period benefits from September 26, 2014 to October 31, 2014. These benefits were paid in a timely manner, with the exception of a rate correction underpayment which was promptly made following reasonable investigation. No delay in payment has been established and no penalty benefits are awarded with respect to this period.

Claimant was awarded healing period benefits for the period of December 8, 2014 through August 20, 2015. During this period, it appears nine weeks of benefits were delayed, including the weeks of December 8, 2014, December 15, 2014, December 22, 2014, February 12, 2015, April 22, 2015, June 18, 2015, July 2, 2015, July 16, 2015, and August 6, 2015. Claimant established a delay in payment of these benefits and defendants did not establish a reasonable or probable cause or excuse for the delay. Benefits owed during those nine weeks total $5,186.70 (9 weeks x $576.30 weekly rate = $5,186.70). A penalty of up to $2,593.35 may be assessed on these delayed benefits.

Claimant was awarded temporary partial disability benefits during the period of August 21, 2015 through September 10, 2015. During this period, defendants actually overpaid benefits, as payment was issued for healing period benefits when only temporary partial disability benefits were owed. No delay in payment has been proven and no penalty is awarded for benefits during this period.

Claimant was awarded healing period benefits from September 11, 2015 through March 4, 2016. During this period, it appears five weeks of benefits were delayed, including the weeks of October 22, 2015, November 25, 2015, December 10, 2015, December 17, 2015, and December 24, 2015. Most troubling among these weeks are the three weeks in December, as benefits were not paid until January 5, 2016 when claimant was off work and recuperating following authorized cervical fusion on

December 7, 2015. Claimant established a delay in payment of these benefits and defendants did not establish a reasonable or probable cause or excuse for the delay. Benefits owed during those five weeks total $2,881.50 (5 weeks x $576.30 weekly rate = $2,881.50). A penalty of up to $1,440.75 may be assessed on these delayed benefits.

Finally, claimant was awarded 125 weeks of permanent partial disability benefits, corresponding to a 25 percent loss of earning capacity. Pursuant to the parties' stipulation, permanent disability benefits commenced on March 4, 2016. Defendants paid permanent partial disability benefits from this date until June 30, 2016, at which point benefits were halted based upon the argument that claimant may not be entitled to any industrial disability benefits due to a lack of permanent restrictions. Claimant argues defendants delayed in paying permanent partial disability benefits in accordance with Dr. Gill's 25 percent whole person rating, equaling 125 weeks of benefits. Claimant also cites to a representation by counsel that such benefits would be paid.

Unscheduled, industrial disability injuries are evaluated for a loss of earning capacity. In this case, claimant did sustain permanent functional impairment, but no permanent restrictions were imposed following the work injury. He subsequently went on to return to work in physically demanding jobs. Claimant did not demonstrate a loss of earnings as a result of the work injury. Additional issues with respect to claimant's credibility clouded investigation into whether claimant sustained a loss of earning capacity.

While functional impairment ratings are a factor to consider in a loss of earning capacity analysis, functional impairment ratings do not represent a floor to an award of industrial disability. It is possible an individual's loss of earning capacity could be lower than the functional rating; the analysis is completed on a case-by-case basis. To find that an impairment rating must be paid in each industrial disability case in order to avoid penalty benefits would convert industrial disability injuries into scheduled injuries. Notably, defendants did pay some permanent partial disability benefits and provided claimant with a contemporaneous explanation for the denial in further benefits. Given the facts of this specific case, I find claimant's entitlement to industrial disability benefits was fairly debatable and as a result, claimant has not proven a delay in payment which would entitle him to penalty benefits.

An extensive amount of indemnity benefits were owed and paid for claimant's September 25, 2014 injury. The significant majority of benefits were paid timely, early, or overpaid. Several weeks of temporary disability benefits were delayed. The delay in payment of benefits following claimant's authorized cervical fusion is egregious and unacceptable. It is determined that an award of $3,000.00 in penalty benefits is appropriate.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33.

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. Dec. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. Dec. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. Dec. July 21, 2009).

Claimant requests taxation of the costs of: $100.00 filing fee; $13.48 service fee; $1,033.00 for Mr. Alverio's FCE; and $2,940.00 for Mr. Marchisio's vocational opinion. The costs of filing fee ($100.00) and service fee ($13.48) are allowable costs and are taxed to defendants.

Mr. Alverio's FCE qualifies as a practitioner's report under rule 4.33 and is therefore, subject to taxation. However, claimant is not permitted to receive reimbursement for the full cost of Mr. Alverio's FCE as a practitioner's report under rule

4.33. Rather, the Iowa Supreme Court has ruled only the portion of the expense incurred in preparation of the written report can be taxed. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). The record fails to include an itemization identifying the portion of the total fee which is allocated to report preparation. Therefore, consistent with the decision of LaGrange v. Nash Finch Co., File No. 5043316 (Appeal July 1, 2015), defendants are taxed with one-third of the total FCE expense. Defendants are taxed with $344.33 of Mr. Alverio's FCE fee (33 1/3 percent x $1,033.00 = $344.33).

Finally, claimant seeks taxation of Mr. Marchisio's vocational evaluation in the amount of $2,940.00. Review of the supporting documentation reveals this expense actually reflects the cumulative total charges in four invoices, covering two vocational reports and associated services. Neither of the resultant vocational reports provided probative assistance to the undersigned, as set forth *supra*. As a result, I conclude no portion of the vocational expenses should be taxed as a cost to defendants. While some portion of one of the reports could be taxable as a practitioner's report, I exercise the discretion provided to this agency and decline to assess any portion of the vocational expense to defendants.

Defendants are taxed with costs in the amount of $457.81 ($100.00 + $13.48 + $344.33 = $457.81).

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant healing period benefits at the weekly rate of five hundred seventy-six and 30/100 dollars ($576.30) for the period of September 26, 2014 through October 31, 2014.

Defendants shall pay unto claimant healing period benefits at the weekly rate of five hundred seventy-six and 30/100 dollars ($576.30) for the period of December 8, 2014 through August 20, 2015.

Defendants shall pay unto claimant healing period benefits at the weekly rate of five hundred seventy-six and 30/100 dollars ($576.30) for the period of September 11, 2015 through March 4, 2016.

Defendants shall pay unto claimant temporary partial disability benefits for the period of August 21, 2015 through September 10, 2015.

Defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing March 4, 2016 at the weekly rate of five hundred seventy-six and 30/100 dollars ($576.30).

Defendants shall receive credit for benefits paid.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall pay penalty benefits in the amount of three thousand and 00/100 dollars ($3,000.00).

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 11th day of September, 2018.

Erica J. Fitch

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.